

No. 80865-1
55217-1-1

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON

Respondent

v.

GLEN SEBASTIAN BURNS

Petitioner

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 MAR 14 PM 5:55

SECOND AMENDED
SUPPLEMENTAL BRIEF OF PETITIONER GLEN SEBASTIAN
BURNS

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STATE OF WASHINGTON

GLEN SEBASTIAN BURNS
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Walla Walla, Washington 99362

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A. ASSIGNMENT OF ERROR

I respectfully submit that the Washington Constitution guarantees the right to self-representation on appeal and that the Court of Appeals erred in denying my request to proceed pro se.

B. STATEMENT OF THE CASE

I am appealing three false convictions for aggravated murder in the first degree. The Washington Appellate Project was appointed to represent me on appeal, but on July 17, 2007, I informed counsel that I wished to proceed pro se. This was four days after counsel filed an initial opening brief on July 13, 2007, but two weeks before counsel filed an Amended Opening brief on July 30, 2007. On August 20, 2007 my motion was filed requesting to proceed pro se. (“Appellate Burns Motion to Proceed Pro Se and Allow Counsel to Withdraw”.)

Court of Appeals Commissioner James Verellen granted my motion to proceed pro se on August 28, 2007. (“Commissioner’s Notation Ruling”). Then, after receiving a response brief from the State (“State’s Response to Burns’ Motion to Proceed Pro Se and Allow Counsel to Withdraw” [“State’s Response”] dated September 6, 2007) which was treated as a motion for reconsideration pursuant to RAP 17.4 (C) (2), the Commissioner withdrew his ruling and referred the matter to a panel of three judges for review without oral argument, which panel denied my motion. I now ask that this Court of Appeals decision be reversed and that my request to proceed to pro

se be granted. Pursuant to RAP 13.7 (d) I now submit this brief to supplement arguments made to the Court of Appeals in “Appellant Burns’ Motion to Proceed Pro Se and Allow Counsel to Withdraw,” and “Appellant Burns’ Response Concerning Motion to Proceed Pro Se”, “and to the Supreme Court of Washington in Burns’ Motion for Discretionary Review.”

C. ARGUMENT

1. THE RIGHT TO SELF-REPRESENTATION ON APPEAL IS PROTECTED BY THE WASHINGTON CONSTITUTION

a. Textual Analysis Of Wash. Const. art 1 §22 Demonstrates A Right To Self-Representation On Appeal

In State v. MacDonald 143 Wn. 2d 506, 22 P 3d 791 (2001) at 511 n3) “this court observed that “...no Washington court has examined the right to self-representation on appeal “; and indeed, this court did not do so in that case, noting that the disposition of that case obviated need “fully [to] address and analyze the constitutional right to proceed pro se on appeal. “143 Wn. 2d at 510-11. However, although no case has presented issues directly requiring such an examination, the Supreme Court of Washington did have indirect occasion to do so in State v. Jones, 57 Wn. 2d 701, 703-5, 359 P. 2d. 311 (1961), wherein, when the appellant became insane, his direct appeal was stayed in part because his insanity deprived him of his right to represent

Footnote: The moot issue in that case might also have been tangential since MacDonald refused the Faretta inquiries. Id 143 Wn. 2d at 511 note 3

himself on appeal. This stay tended either by his recovery or showing of appointed guardian ad litem of good cause why the guardian should be permitted to prosecute the appeal on Jones' behalf. Further, in the dissenting opinion, Mallory J. concurred that before his sudden incompetency, Jones had had the right to self-representation on appeal (which he hadn't asserted), and disagreed only that a guardian could waive an appellant's "peculiarly personal" constitutional right to counsel, even to the limited extent of temporarily not enacting Jones' same position to proceed with counsel. Jones, Wn. 2d at 705-6. Invoking the language of Washington Const. art 1 §22, Justice Mallory described the "... right to an appeal by counsel (emphasis in original) that having been "...vested by an authoritative action of his own during his competency. Neither his counsel nor this court can question the validity of his decision not to appeal in his proper person..." (emphasis added). Jones 57 Wn 2d at 705. The clear premise is that it is the appellants constitutional right to appeal in person. The majority elaborated, "...the appellant....is mentally competent to participate in the appeal and not satisfied with the way in which his counsel were proceeding ... would be permitted to argue his case pro se...". Jones, 57 Wn. 2d at 703 (emphasis in original). It is respectfully submitted that this presents compelling indirect authority recognizing the state constitutional right to self-representation on appeal.

Under the federal constitution, there is no right to act pro se on appeal. Martinez v California, Court of Appeals of California 4th Appellate Division 528 U.S.152, 165, 120 S. Ct. 684, 145 L. Eb. 2d 597 (2000). In a separate concurrence (Id., 528 U.S. at 165) Justice Scalia summarized simply that, "...the question is readily answered by the fact that there is no constitutional right to an appeal. "It is respectfully submitted that in Washington the question is readily answered by the fact that there is a state constitutional right to an appeal. Justice Scalia observed that, constitutionally, federal denial of self-representation on appeal abrogated no right since appeal could be eliminated altogether. (Id. , supra) This is simply not the case in Washington, moreover, Justice Scalia's identification of the right to appeal as the determinative element is confirmed throughout the majority's decision, which decision does not argue that the right to self-representation would not inhere in a constitutional right to an appeal: the entire Martinez analysis is expressly consequent to the absence of this right. Accordingly, the most pertinent difference between the federal and state constitution is the provision of Washington Const. art 1 §22 that "in criminal prosecutions" the accused shall have the right to appeal in all cases. The court must decide what the meaning of this difference is. Martinez discerned in Faretta v. California, 422 U.S. 806, 833-4, 95 S Ct. 2525, 45 L Ed 2d 562 (1975) three rationales which it applied to the question of appellate self-representation (Martinez, 528 U.S. at 159-163) and that analytical model will

be followed below in this brief. The first two are textual and historical analysis, which also overlaps with the first three factors recommended for constitutional comparison in State v Gunwall, 106 Wn 2d 54, 61, 720 P. 2d 808 (1986). The third is Faretta's regard for the integral principle of individual autonomy.

The State argues that the meaning of this state constitutional clause is not that the appellant has the right to represent himself on appeal; because the state claims, there is no "link" between the right to appeal" and the right to "defend in person". "State's Response" at 7,9. It will be explained in the next paragraph why this claim is incorrect; but it is worth noting precisely what interpretation would result from the State's logic. The State's claim is that because Washington's Constitution states that the accused has the right to "defend in person", but does not state that he has the right to appeal in person" the constitution therefore provides no constitutional right to self-representation on appeal. By the same logic, we would ineluctably be forced to conclude that since Washington's constitution states that the accused has the right "to defend...by counsel," but does not state that one has the "right to appeal by counsel" he therefore has no constitutional right to counsel on appeal: the State's logic would force us to conclude that the Washington constitution provides neither the right to counsel on appeal nor the right to self-representation on appeal, and that, since there are obviously no other

means to an appeal, one therefore has no constitutional right to an appeal.

This logic is plainly untenable.

Assuming the court agrees that it can't simply hold that the Washington constitution provides no right to an appeal, the task for this court, then, is to decide what a correct textual analysis of the State constitutional right to an appeal would be. Faretta v California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L. Ed. 2d 562 (1975) provides an example of such a textual analysis. The Faretta court found that all the rights in each phrase in the Sixth Amendment are linked directly to the accused. Then, following Faretta's example, the Washington Constitution right to an appeal is linked directly to the accused. Since the state's logic is impossible, the comparison of the parallel clauses shows that both constitutions link all the rights directly to the accused, and that the only difference is that the Federal constitution includes no right to an appeal, and the Washington Constitution does, therefore linking the state constitutional right to an appeal directly to the accused.

Moreover, because Wash. Const. art 1 §22 circumscribes "criminal prosecutions," the distinguishing inclusion of appeal establishes its constitutionally defined scope:" the over-arching process of criminal prosecutions is the single entity comprising "trial" and "appeal". (See Kenneth G. Wilson The Columbia Guide to Standard American English, P341 (1993): prepositional phrase at the start of sentence adverbial

governance entire clause. This same reasoning in Martinez isolates the determinative absence of appeal from the Sixth Amendment treatment of “criminal prosecutions;” and in this respect it is Martinez that exemplifies correct textual analysis, according to which inclusion of appeal in the “criminal prosecutions” clause is determinative. And importantly, Martinez also makes clear that if there were in the Sixth Amendment the right to appeal, there would still be a right to self-representation on appeal even though the right to self-representation is not explicit. And since addition to this text of a right to appeal would thereon guarantee implicit right to self-representation, In tense it guarantees it a fortiori in Washington where the right to self representation is explicit. Thus the state’s claim that the right to appeal and the right to self-representation are not textually “linked” is incorrect. Washington’s constitution places “appeal” inside the defined compass of the criminal prosecutions process, and grants the accused his right to counsel and self-representation throughout that process.

I have been unable to find any Washington authority confirming the right to appeal by counsel per §22 (and per Justice Mallory’s §22 language, “appeal by counsel (emphasis in original) Jones 57 Wn 2d at 705)); the necessity for such confirmation seems to have been precluded by RAP 15.2, RCW 10.101 and federal authority e.g. Smith v. Robbins 528 U.S. 259, 120 S Ct.746, 145 Led 2d 756 (2000) and the latter especially evokes a more diffuse corpus of rationales than would be per se equatable to §22 and hence

does not prove reliance by a Washington Court on an identical principle to that proposed in this brief. But this still begs the question of which form of appellate representation is guaranteed by §22 since it must be one of the two: and existence of either inductively proves the other as the parallel consequent of the ambit of the criminal-prosecutions phrase. Textually, this proves the right to self-representation on appeal.

In fact, the Supreme Court of Washington has gone even further in discerning structural indivisibility within section 22 itself. In contrast to the State's argument that the separate phrases containing the right to appeal and self-representation are not textually linked (despite being in the same list in the same clause) the court found in State v. Foster 840 Wn. 2d 58, 62, 146 P 169, (1915) that the reach of the organic constitutional instrument extended to all its fingers, such that constitutional guarantee of "...every incident and every privilege attending the right [to appeal] "included even rights protected in different sections of art. 1; viz. , bail rights protected in §20.

b. The Creation Of A Constitutional Right To Appeal Is Historically More Prescriptive Than Recognitive And So The Right Is Uninhibited By Scarcity Of Precedent: But The Recency Of The Right To Counsel On Appeal Reveals The Framers Couldn't Not Have Intended An Integral Concomitant Right To Appellant Self-Representation, Lest Appeal Be No Right At All.

In terms of historical analysis, the introduction of an unprecedented constitutional right gives transformative authority to the independent constitutional principle when such a right implements, in the face of history, a philosophical advancement. As James Lobsenz observes in his article “A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction” 8 U. Puget Sound. L. Rev. 375, 379-80 (1985),

“The Washington Supreme Court has suggested that an examination of the “[T]he central principles of the common law “is an appropriate aid to state constitutional interpretation. [State v. Ringer, 100 Wash. 2d 686, 691, 674 P. 2d 1240, 1243 (1983).] By interpreting our State constitutional provision in a manner “consistent with their common law beginnings,” the courts can best achieve the intentions of the framer [Id. at 699, 674 P. 2d at 1274.] “But with respect to the right to appeal, there are no “common law beginnings” and no applicable “central principles of common law.” The provision in article I section 22 granting a constitutional right to appeal in all criminal cases marks a sharp break with the common-law past. Consequently, proper judicial interpretation of the scope of the constitutional right to appeal must reflect the framers intention to transform a discretionary privilege into an absolute right.... Recognition of the historical background of the right to appeal, therefore, leads to the conclusion that the framers would have been vigorously opposed to

any attempt, either legislative or judicial, to restrict a convicted defendant's right to appeal...."

Thus in this light Faretta's negative historical evidence that was improbative in Martinez regarding constitutionally unprotected appeal, has unabated significance in Washington. Washington has not repudiated any Const art 1 §22 rights of appellants; even denial of presence on appeal denies no more than that at trial-court proceedings deemed unnecessary. (see States Response at 8) The State's argument is also unsupported by any constitutional interpretation from any state refuting the inherence of the right to self-representation in the specific right to appeal in criminal cases. But ultimately, the acknowledgement in Jones of the history of appellants without counsel who had to submit their cases "on the briefs" (57 Wn. at 703), like the contemporaneous development in Hendricks v. Rhay, 56 Wn 2d 420,423, 353 P. 2d 817 (1960) of appointment of counsel on appeal, reminds us that a right to counsel on appeal is a comparatively new development: and therefore the constitutional right to appeal must have incorporated a right to self-representation on appeal: and therefore it must still to this day.

c. Interests In Individual Autonomy Are Undiminished When Appeal Is A Constitutional Right

The State's use of the Martinez courts' analysis that interests of individual autonomy are less compelling on appeal is a misapplication. (State's

Response at (8-9),(5-6). The entire Martinez analysis in this regard is predicated upon its introductory ...“conclusion that the Sixth Amendment” does not apply to appellate proceedings...”. Martinez 528 U. S. at 162-3.

The Faretta court has held that when an action on one’s criminal case is constitutionally entitled, this entitlement is to the person and the defendant “...must be free personally to decide whether in his particular case counsel is to his advantage.” Faretta 422 U.S. at 834 (emphasis added). Faretta held, moreover, that this imperative supercedes the collateral concern, for due process, that the average accused will advocate less successfully than counsel, because “[b] personal liberties are not rooted in the law of averages.”Faretta, supra. Thereafter, the Martinez court agreed that Faretta’s respect for individual autonomy would be, “of course”, applicable to an appellant seeking self-representation, but held that because appeal is not a federal constitutional right these otherwise undiminished autonomy interests are given less weight – the balance, at trial, between state interest and individual interest is altered on appeal, by the instant constitutional disentitlement of the appellant to his appeal. Martinez, supra. Under the Washington Constitution, this disentitlement does not occur; this alteration of the balance does not occur; the appellant is as constitutionally entitled as ever to make his case. Indeed, this precedence of the appellant’s autonomy was the expressed basis of Justice Mallory’s rejection of a guardian’s authority to waive even by postponement an appellant’s constitutional right

to counsel, and while the majorities decision does not elaborate this philosophy in this pre-Faretta case, their scrupulous protection of the appellant's continuing right to choose either right of representation is even more forcefully differential to the principle evoked in Justice Mallory's caution that "...constitutional rights are peculiarly personal." Jones 57 Wn at 703-6.

2. THE MOTION WAS TIMELY; AND THE CIRCUMSTANCES WOULD STILL JUSTIFY ITS BEING GRANTED EVEN HAD IT BEEN LATE

The State has argued that the motion was not timely. The notion of timeliness is addressed in State v. Fritz 21 Wn. App. 354, 360-1, 585 P. 2d 173 (1979). Fritz delineated requests to proceed pro se into three degrees of timeliness, and presented a legal analysis for each. (State's Response at 13-17). Each of these degrees is distinguished in terms of the request's timing in relation to the hearing in question. The first degree of timeliness is if the request is made "...well before the...hearing and unaccompanied by a motion for a continuance...". The second is, "...as the ...hearing is about to commence, or shortly before..."; and the third is, "...during the ... hearing..." Fritz, supra. The court may wish to decide into which of these three categories my pro se requests falls; but, as shall be demonstrated below, my request satisfies the Fritz criteria irrespective of the degree of

timeliness wherein the court finds the assertion to have been made. The question of which degree of timeliness into which the assertion falls will be addressed in the next two paragraphs.

The timeliness of the request must be “measured from the date of the initial request”. State v. Breedlove 79 Wn. App. 101, 109, 900 P. 2d 586 (1995). My motion was made on August 20, 2007; but it should be noted that I asserted this right in a telephone call to counsel on July 17, 2007. (Breedlove’s exact language, “initial assertion”, perhaps supports the significance of my initial assertion to counsel; although Breedlove’s instant example is the initial filing of the motion in court in contrast to the date the motion was heard.) This initial assertion to counsel was two weeks before counsel filed an amended opening brief, and a month before counsel for the State had even submitted a notice of appearance. Such timing is arguably per se of the earliest degree of timeliness. The motion was ultimately filed before any response brief, or reply brief, or the setting of any date for consideration. It is respectfully submitted that this motion was made, pragmatically, well before the hearing, amid the early stages of pre-hearing briefing, before the state had begun to respond. There was no hearing scheduled and thus no showing of a significant, identifiable delay. It is respectfully submitted that because the motion was made well before the hearing and thus Fritz timeliness, my right to self-representation, exists as a matter of law. Fritz, supra.

The state, however, asks the court to hold that I did not make my motion well before the hearing, during pre-hearing briefing. The State asks the court instead to imagine that my motion was made in the middle of a trial (“State’s Response” at 16), implicitly as though there are jurors who will be kept waiting, witnesses who will have to be re-scheduled and professionally inconvenienced, court personnel who will have to be reassigned, exhibits that will require re-administration... it is respectfully submitted that a mid-trial request would potentially present numerous, real identifiable delay issues that would have to be weighed in the request’s specific circumstances, and that these hypothetical delay issues of a hypothetical mid-trial request simply do not exist in this case. The reality is that my motion was plainly made amply before an unscheduled hearing, and there is simply no basis to displace that reality by conceiving of it as a request made in the middle of a trial.

Footnote: The state’s claim that RAP 18.3 (1) presently bars counsel’s withdrawal is addressed below in a separate section because it is considered a discrete point of law. But it should be noted that this rule was intentionally created as an index of timing precisely equating the filing of an opening brief with the setting of a case for trial at the commensurate moment of counsel’s commitment. (See 3 Orland and Tegland Washington Practice RAP 18.3, Task Force Comment 88 P. 595 (1998). Thus, as a measurement of the timeliness of a pro se request, this rule defines a request made shortly after the filing of a brief that the equivalent of a request made shortly after a setting of a case for trial, completely contradicting the State’s argument that the filing of the opening brief is temporally comparable to the middle of a trial. If anything, the rule defines such a request as per se timely

The unreasonableness of the State's analogy is further demonstrated by the prescription Fritz presents for requests to proceed pro se that are made late; Fritz is very precise in its guidance of the judge's limited discretion in such cases. (see citation below). As the court remarked in Breedlove in its discussion of Fritz and other cases.

"... Washington courts have recognized that the timeliness requirement should not operate as a bar to a defendant's right to proceed pro se:

[The] imposition of a 'reasonable time' requirement should not be and, indeed, must not be used as a means of limiting the defendant's constitutional right to self-representation. We intend only that a defendant should not be allowed to misuse the Faretta mandate as a means to unjustifiably delay a scheduled trial or obstruct the orderly administration of justice.... When the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted. n8 (n8 Fritz, 21 Wn. App. at 362 Windham, (People v. Windham 19 Cal. 3d 121, 560 P.2d 1187)). "[An] inference of [improper purpose of the mere fact of a simultaneous request for a continuance] is improper because Breedlove did not condition his request to proceed pro se with a demand for a continuance because the motion

for a continuance may just as well, evince his expressed desire to prepare the defense his counsel had neglected to prepare. Breedlove, 79 Wn. App. at 109.

Because there is no evidence that Breedlove's motion was designed to delay his trial or that granting it would have impaired the orderly administration of justice we hold that the trial court abused its discretion in denying Breedlove's request.

Breedlove at 109-110 (quoting Fritz 21 Wn. App. at 364) (quoting Windham .People v. Windham 19 Cal. 3d 121, 560 P.2d 1187, Cert. denied, 434 U.S. 848 (1977)) (emphasis added except for “constitutional” and cited cases; ellipsis in original). Thus, even in the hypothetical case of a mid-trial request there would still be an abuse of discretion in denying the request if the pragmatic reality of the actual, case-specific circumstances did not compel it: there would still be no per se discretion to deny the right on a hypothetical principle of hypothetical delay if the real circumstances were different as such, to claim that the court should imagine that a pre-hearing request is actually a mid-trial request would only beg the questions of what real, identifiable trial elements would be delayed; and since the present case is actually pre-hearing, the inevitable conclusion must be that no such hypothetical trial elements are present. We need look no further for proof of this than the court clerk's initial ruling: had I been given, as he first ruled, a month to re-file an opening brief, this short continuance would have been

inconsequential, especially when apposed to the fact that two weeks after I first asserted the right to counsel, counsel filed another amended brief anyway! And all of which occurring weeks before counsel for the State had even given notice of appearance! (And the State's proffered concern about further continuance requests from me should be disregarded, since the pro se request was not contingent upon any motion for a continuance.)

Furthermore, in such a hypothetical case, Fritz holds that the requests should be granted if the lateness of the motion can be reasonably justified. Such reasonable justification exists in this case. The fact that I informed counsel on July 17, 2007, that I intended to proceed pro se, and that the motion was then not filed until August 20, a month later (the motion also including an affidavit signed by me on August 7, 2007), in itself contributes to reasonable justification of lateness, in that my initial request, in truth, was two weeks before counsel filed the amended opening brief. Also, though I had previously been given some rough drafts from counsel, these drafts did not even contain all of the issues that counsel later submitted of some of which I had been unaware; I did not receive from counsel a complete draft until I received counsel's original opening brief on the evening of July 16, 2007 and, the very next day, I informed counsel that I wanted to proceed pro se. Moreover, counsel had only just mailed to me on July 11 and 12, 2007, thousands of pages, comprising more than 60 trial days, of crucial portions of the report of proceedings, July 13, 2007 being the day counsel mailed to

me my first copy of the complete opening brief. And as of July 17 I still did not have a copy of the rather enormous Superior court file or trial or pre-trial exhibits; and, owing to circumstances that will be explained below, after a seven month separation from my own legal notes, which period spanning two recent prison transfers, I had only recovered them on July 2, 2007, scarcely two weeks before I received counsels complete draft on July 16 and requested to proceed pro se on July 17. And after a similarly lengthy time, I had only just come to have on June 19, 2007, regular ability to attend the prison law library, which ability amounted to approximately 8 hours by July 17, 2007.

A further factor that delayed my motion was that in the many proceeding months I was encumbered with distinctive prison difficulties, that were sometimes incapacitating. I had health issues that at times included significant weight loss, and in December, 2006, I was bound with constraints to a bed for weeks (except for brief, supervised, unshackled "limb rotations") while being fed by a tube during which time legal work was impossible. Also, in the space of two months, in December through January 2007, I was transferred from one prison to another and then to a third (the third being Washington State Penitentiary), and each time my legal materials were not shipped with me. Then, in early March 2007, I was discovered to have been grievously assaulted and kept thereafter in involuntary segregation for three and a half months. I was notified in April

2007, that I was going to be returned to the Clallam Bay Correction Center where my legal materials were still being kept, and consequently I did not request them to be shipped to the Washington State Penitentiary since it appeared that this would only cause more delay. My transfer was then postponed pending a hospital's MRI examination of me following the recently sustained facial fracture. After this examination I was again advised that I would be returned to the Clallam Bay Correction Center; but then on May 17 I was notified that I was instead going to be kept at the Washington State Penitentiary. At this point I learned the procedure to have my legal materials shipped to me, and did so on June 10, 2007; as noted above, they arrived on July 2, 2007.

In addition, in April 2007, during my recovery from the March assault, I was found to have lost weight, and I was obliged to advocate at a prison hearing that my condition would not be improved by involuntary medication. (In April I had been transferred within the same prison from one segregated unit to another, whereupon it was four days before I mailed a letter to my family in Canada updating them of this transfer and 12 days before I ascertained the procedure for calling from a segregation unit and did so; and during this 12-day interruption in contact, my family called the prison to inquire and learning of my transfer said that they hadn't known of it because they hadn't heard from me. This account was somehow circulated and misconstrued by prison personnel, who adduced that I had

fallen out of contact with my family with the hypothesis that I had an eating disorder type “Not Otherwise Specified” which would be cured by involuntary medication.) I prevailed at the hearing; but unfortunately State policy allowed the prison to forcibly administer for 6 days a regime of “anti-depressants” and utterly debilitating “anti-psychotics”. And by unfortunate co-incidence, and to surprise of mine that perhaps might not have been wholly accountable, my one and only visit in prison with appellate counsel presented itself in the very middle of this week of blurry vision and implacable drowsy fatigue.

Roughly a month and a half later, on June 19, 2007, I was released from segregation and was then able to attend the prison law library for up to two hours per week; on July 2, I received my legal materials for the first time in roughly seven months; on July 16, for the first time, I received a complete draft of counsel’s opening brief, and in the same week received thousands of pages of the report of proceedings; and on July 17 I informed counsel that I wished to proceed pro se, two weeks before counsel filed its final amended opening brief, and a month before State counsel gave notice of appearance, and a week before I had even begun to receive the majority of the Superior Court file. It is respectfully submitted that even if, at the State’s suggestions, the court were to conceive of my motion to proceed pro se as having been made during the middle of a hypothetical trial, all of the foregoing would present reasonable justification for the lateness of the

motion, and that the hypothetical trial court judge would therefore be obliged, per Fritz and Breedlove to grant the motion. But since in actuality my motion was made well before the hearing, it is respectfully submitted that my right to self-representation exists as a matter of law.

3. THE GRANTING OF A TIMELY OR A JUSTIFIEDLY LATE MOTION TO PROCEED PRO SE IS PER SE “GOOD CAUSE” PER RAP 18.3 (1); RAP 18.3 (1) IS NOT THE INDEX OF TIMELINESS

The State argues that RAP 18.3 (1) would bar a motion to proceed pro se made after the filing of the opening brief but for a showing of “good cause”. (“State’s Response” at 14: State’s “Answer to Motion for Discretionary Review” at 10,11). It is respectfully submitted that this is a misreading of the rule. RAP 18.3 (1) is the Court of Appeals analogue to CrR 3.1 (e); (3 Orland and Tegland Wash. Pract.: RAP 18.3, “Task Force Comment 88”, at P 595 (1998)); the latter limits withdrawal of counsel once a case has been set for trial, and the former once an opening brief has been filed. An otherwise timely or justifiedly late hiring of new counsel or request to proceed pro se would be per se “good cause” or “good and sufficient reason” as these rules require. The purpose of these parallel rules has never been to limit otherwise timely or justifiedly late requests to change in either of these ways from court appointed representation, nor to define timeliness in this respect: these rules have never been used as such. Their purpose rather is to implement the right to counsel and the precedence given

to the right to counsel over the attorney's right to withdraw; and to implement specifically the premise that the accused's right to counsel would not be meaningful if counsel could without good reason withdraw after the setting of the a case for trial or the filing of an opening appellate brief. (See 4A Orland and Tegland Wash. Pract. CrR 3.1 P 130 (1998)). Thus the rationale of CrR 3.1 (e) and RAP 18.3 (1) patently ceases to apply once the right to counsel is waived. And accordingly, for example, the corresponding federal obligation on counsel not to withdraw after arraignment and thereby to uphold the accused's right to counsel) (United States District Court for the Western District of Washington CrR 5d (2)) has never been interpreted as a comparable – let alone identical – obligation on the accused not to waive appointed representation and thereby to uphold his own right to counsel; hence the acknowledged timeliness of requests to proceed pro se made long after counsel has been committed (See e.g. Fritz v. Spalding S. 2d 782, 784 (1982) (request made before jury empanelment is timely)), demonstrating a standard of timeliness completely distinct from the date of counsel's commitment against withdrawal.

The State effectively argues that the date of counsel's commitment against withdrawal should impose on the right to self-representation a criterion of timeliness that would overrule, for example, the standard in State v. Fritz; that the court should adopt an additional rule that a motion to proceed pro se that is otherwise timely or justifiedly late and thus to be

granted per Fritz; should nevertheless be compulsorily denied absent some implicitly exceptional showing of a "good cause" that exceeds the mere constitutional entitlement to self-representation. Such a rule, inherently, would unnecessarily restrict the constitutional right and would accordingly be unconstitutional.

D. CONCLUSION

I respectfully request that my motion to proceed pro se be granted.

Respectfully submitted,

Glen Sebastian Burns by *Nanik Wink*
Glen Sebastian Burns, pro se (#7780)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
GLEN SEBASTIAN BURNS,
Petitioner.

FILED
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CLERK OF SUPREME COURT
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CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 14TH DAY OF MARCH, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **SECOND AMENDED SUPPLEMENTAL BRIEF OF PETITIONER BURNS** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] BRIAN MCDONALD	(X)	U.S. MAIL
DEBORAH DWYER	()	HAND DELIVERY
KING COUNTY PROSECUTING ATTORNEY	()	
APPELLATE UNIT		
KING COUNTY COURTHOUSE		
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
 [X] DAVID KOCH	(X)	U.S. MAIL
ATTORNEY AT LAW	()	HAND DELIVERY
NIELSEN, BROMAN & KOCH, PLLC	()	
1908 E MADISON ST.		
SEATTLE, WA 98122		

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF MARCH, 2008.

x *gril*

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